

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>HAZRAT HOTAKI</b>	:	ORDER
		DTA NO. 820405
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period September 1, 2001 through August 31, 2003.:	:	

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Petitioner, Hazrat Hotaki, 3328 Oceanside Road, Oceanside, New York 11572, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2001 through August 31, 2003.

A hearing was scheduled before Administrative Law Judge Dennis Galliher at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on Thursday, September 29, 2005 at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated November 25, 2005 that the default determination be vacated. The Division of Taxation filed a response in opposition to petitioner's application to vacate the default dated December 23, 2005.

Petitioner, Hazrat Hotaki, appeared by Inayat I. Shaikh, Esq. The Division of Taxation ("the Division") appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

***FINDINGS OF FACT***

1. For the period here at issue, petitioner operated a mobile food vending business (“pushcart”) located on the southeast corner of 72<sup>nd</sup> Street and Amsterdam Avenue in Manhattan. In January of 2004, the Division of Taxation (“Division”) commenced an audit of petitioner’s business. The Division determined that it was necessary to estimate petitioner’s taxable sales due to a lack of records to document his sales. As a result of the field audit, the Division issued a Notice of Determination assessing tax of \$7,899.87 plus penalty and interest.

2. Petitioner filed a petition protesting this assessment on February 22, 2005. In his petition, petitioner argued that the Division’s estimate of his taxable sales was incorrect and that he held a full-time job which prevented him from working full-time with his pushcart.

3. On April 20, 2005, the Division of Taxation filed its answer, in which it asserted that petitioner was required to maintain complete books and records and had failed to do so. The Division also asserted that the sales tax liability was based on petitioner’s being a part-time pushcart vendor.

4. On May 17, 2005, the Division of Tax Appeals mailed to petitioner and to the Division of Taxation a Notice to Schedule Hearing and Prehearing Conference asking the parties to agree upon a mutually convenient date for the hearing. A response from the Division of Taxation selected the date of September 29, 2005 and the location of Troy, New York. The Division’s response also indicated that Ms. Murphy had been unable to get in touch with petitioner’s representative. Petitioner and his representative did not respond to the Notice to Schedule Hearing. On August 22, 2005, the Division of Tax Appeals mailed notices of hearing advising the parties that a hearing was scheduled for the instant matter on September 29, 2005 at the offices of the Division of Tax Appeals in Troy, New York.

5. On September 9, 2005, petitioner's representative indicated in a telephone conversation with the calendar clerk of the Division of Tax Appeals that he was having knee replacement surgery and, in addition, that he wished to have the instant case heard as a small claims case. However, although petitioner's representative promised to submit his request for small claims treatment in writing, no such written request was ever received by the Division of Tax Appeals. Petitioner's representative never submitted a written request to adjourn the scheduled hearing. The Division of Tax Appeals received a telephone call from Mr. Taj Akbar, petitioner's accountant requesting an adjournment of the September 29, 2005 hearing due to Mr. Shaikh's knee surgery. Mr. Akbar is not authorized to represent petitioner before the Division of Tax Appeals and, therefore, is not authorized to make a request for an adjournment of the scheduled hearing. In addition, regulation section 3000.15(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal requires that any request for adjournment of a hearing be submitted in writing at least 15 days in advance of the scheduled hearing. No such request has ever been received by the Division of Tax Appeals.

6. On September 29, 2005 at 10:34 A.M., Administrative Law Judge Dennis Galliher called the *Matter of Hazrat Hotaki*, involving the petition here at issue. Present was Jennifer A. Murphy, Esq., as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. Ms. Murphy moved that petitioner be held in default. On October 24, 2005, Administrative Law Galliher issued a determination finding petitioner in default.

7. On November 28, 2005, petitioner filed an application to vacate the October 24, 2005 default determination. In his application, petitioner's representative explained that he was unable to appear at the hearing because he had undergone knee replacement surgery on

September 13, 2005 and was in the hospital from September 13, 2005 through September 30, 2005. Petitioner's representative asserted that he had conferred with petitioner and his accountant and had concluded that petitioner had a meritorious case. Petitioner's representative did not explain the basis for his conclusion.

8. On December 23, 2005, the Division of Taxation filed a response in opposition to petitioner's application to vacate the default determination. The Division pointed out that petitioner chose not to appear at hearing even after the Division of Taxation and the Division of Tax Appeals had explained fully how petitioner should go about obtaining an adjournment or a change of venue to small claims.

Moreover, the Division asserted that petitioner failed to keep adequate records even though he knew he was required to do so. It is the Division's opinion that it is improbable that petitioner will now be able to produce records of sales which would prove the assessment incorrect.

### ***CONCLUSIONS OF LAW***

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (20 NYCRR 3000.15[b][2].) The rules further provide that: "Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case." (20 NYCRR 3000.15[b][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the administrative law

judge correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.15(b)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that he had a meritorious case (20 NYCRR 3000.15[b][3]; *see also, Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioner's representative was clearly unable to attend a hearing while he was in the hospital having knee replacement surgery. Had a written request for an adjournment been submitted by petitioner, it undoubtedly would have been granted. Nevertheless, petitioner never submitted a written request for an adjournment and no adjournment was granted. Petitioner's representative has explained why he could not attend the hearing. However, he has not explained why neither he nor petitioner asked for an adjournment. Certainly, petitioner's representative knew well in advance that he would be unable to attend the hearing. Petitioner and his representative were made aware of the requirements for requesting an adjournment and still they did not bother to do so. Accordingly, I find that petitioner has not established reasonable cause for failure to appear at his hearing.

D. Petitioner failed to keep proper records of sales for his pushcart business. At this point, all he has is his opinion and that of his accountant that the assessment is excessive. Petitioner has not alleged that he has any evidence whatsoever to controvert the assessment. While petitioner complains that he only worked part-time on the pushcart, the Division asserts that he was only assessed based upon working part-time. In the absence of a showing that petitioner has any evidence whatsoever tending to show that he owes a lesser amount of tax, I find that petitioner has failed to demonstrate that he has a meritorious case.

E. It is ordered that the request to vacate the default determination be, and it is hereby, denied and the default determination issued on October 24, 2005 is sustained.

DATED: Troy, New York  
March 16, 2006

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE